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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Remark Holdings, Inc. and KanKan Limited,

Plaintiffs

v.

China Branding Group Limited, et al.,

Defendants

Case No.: 2:18-cv-00322-JAD-CWH

**Order Granting Roseman's (1) Motion to
Reconsider Stay Order and (2) Motion to
Dismiss**

[ECF Nos. 20, 60]

Plaintiffs Remark Holdings, Inc. and KanKan Limited (the Buyers) sue Adam Roseman, China Branding Group Limited (CBG), and CBG's Joint Official Liquidators (JOLs)¹ to rescind what they contend was a fraudulently obtained agreement to purchase three of CBG's companies that "worked together to film and stream American content to China" (the Target Entities).² Roseman moved to dismiss the Buyers' claims and the other defendants followed suit.³ CBG and the JOLs also filed a counterclaim against the Buyers.⁴ The parties then mediated their disputes with a private mediator; the Buyers "reached an agreement in principle" with CBG and the JOLs, but not with Roseman.⁵

Seeking more time to negotiate the final terms of their settlement, the Buyers, CBG, and the JOLs stipulated to hold both their and Roseman's dismissal motions in abeyance.⁶ Because

¹ The named JOLs are Hugh Dickson of Grant Thornton Specialist Services (Cayman) Ltd. and David Bennett of Grant Thornton Recovery and Reorganization Ltd. ECF No. 1 at ¶ 4.

² ECF No. 1 at ¶ 18. The Target Entities are RAAD Productions, LLC; China SNS Group Limited; and Fanstang (Shanghai) Entertainment Information Consulting Co. Ltd. ECF No. 21-1 at 65.

³ ECF Nos. 20 (Roseman), 40 (CBG and JOLs).

⁴ ECF No. 53.

⁵ ECF No. 58 at 2, ¶ 5.

⁶ ECF No. 58.

1 that stipulation was filed by fewer than all parties to this case, I construed it as a joint motion
2 under Local Rule 7-1(c) and, finding good cause, I granted it and held both Roseman's and CBG
3 and the JOLs' dismissal motions in abeyance.⁷ Roseman immediately moved for
4 reconsideration, arguing that the Buyers' settlement with CBG and the JOLs should not preclude
5 a decision on his entirely separate dismissal motion.⁸ The Buyers oppose Roseman's motion and
6 move to enforce the stipulated settlement that they reached with CBG and the JOLs.⁹

7 In light of the Buyers' motion to enforce their settlement with CBG and the JOLs, I grant
8 Roseman's motion for reconsideration and lift the temporary stay on his dismissal motion. And,
9 for the reasons explained below, I grant Roseman's dismissal motion without prejudice and with
10 leave to amend except as otherwise stated in this order.

11 Discussion

12 Roseman offers four reasons why the Buyers' claims against him are infirm: (1) he is not
13 a party to the purchase agreement, so he cannot be sued for its rescission or for a declaration of
14 rights thereunder; (2) the purchase agreement's integration and non-reliance clauses bar the
15 Buyers from relying on any extra-contractual representations; (3) claims for intra-contractual
16 representations are contractually time barred; and (4) the Buyers fail to allege fraud with the
17 required particularity and plausibility. The parties agree that Delaware supplies the substantive
18 law in this diversity case because that state's laws govern the purchase agreement that lies at the
19 heart of the Buyers' claims. They also agree that I can consider the terms of that agreement
20 without converting Roseman's dismissal motion into one for summary judgment.

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22 ⁷ ECF No. 59.

23 ⁸ ECF No. 60.

⁹ ECF No. 63. I do not address the Buyers' motion to enforce settlement in this order.

1 **A. Roseman’s status vis-à-vis the purchase agreement is not proper dismissal fodder.**

2 Roseman first argues that he is not a party to the purchase agreement, so the Buyers’
3 (1) remedy for their common law fraud claim of rescinding that agreement and (2) claim for a
4 declaration of rights under it both fail. Roseman theorizes that he isn’t a party to the transaction
5 because he didn’t sign the purchase agreement in his individual capacity or his capacity as
6 “Seller Management,” as defined in the agreement,¹⁰ and he never incurred any personal
7 obligations in connection with the transaction. Roseman acknowledges that he did sign the
8 purchase agreement, but only in his capacity to act on behalf of the Target Entities.¹¹

9 The Buyers respond that Roseman is a party to the purchase agreement because he’s
10 identified in the agreement’s preamble as “Seller Management,” who is one of the six parties that
11 the agreement was “entered into by and among”¹² Roseman, as Seller Management,
12 incurred obligations in connection with the transaction, including making the representations and
13 warranties in Article IV of the agreement.¹³ And Roseman obtained nearly half a million dollars
14 in the transaction that must be clawed back if the agreement is rescinded.

15 As the parties’ briefs demonstrate, whether Roseman is a party to this transaction raises
16 factual questions. Because it is not appropriate to resolve factual disputes at the dismissal-
17 motion stage of a case, I deny Roseman’s motion on this ground. However, I dismiss the
18 Buyers’ declaratory relief claim against Roseman because it is duplicative of their fraud claim,

19 ¹⁰ ECF No. 21-1 at 7 (preamble to the Second Amended and Restated Asset and Securities
20 Purchase Agreement states that it “is entered into by and among . . . (3) Adam Roseman (the
21 ‘Seller Management’”).

22 ¹¹ ECF No. 20 at 10 (Roseman explains that he signed the purchase agreement as the director of
RAAD Productions, LLC; a representative of China SNS Group Limited; and as a legal
representative of Fanstang); *accord* ECF No. 21-1 at 63.

23 ¹² *See* ECF No. 21-1 at 7.

¹³ *See id.* at 23–34.

1 Roseman is not mentioned in that claim, and even if he's a party to the transaction, he isn't a
2 party to the controversy that claim seeks to redress.¹⁴

3 **B. Whether the fraud claim is precluded by the agreement's terms is a mixed bag.**

4 Roseman next argues that the fraud claim is precluded by the purchase agreement. The
5 elements of common law fraud in Delaware are (1) "a false representation, usually one of fact,
6 made by the defendant;" (2) "the defendant's knowledge or belief that the representation was
7 false, or was made with reckless indifference to the truth;" (3) "an intent to induce the plaintiff to
8 act or refrain from acting;" (4) "the plaintiff's action or inaction taken in justifiable reliance upon
9 the representation; and" (5) "damage to the plaintiff as a result of such reliance."¹⁵ Fraud may
10 take the form of "overt misrepresentations, but may also occur through deliberate concealment of
11 material facts, or by silence in the face of a duty to speak."¹⁶

12 **1. The Buyers expressly disclaimed reliance on extra-contractual statements.**

13 Roseman argues that the "Entire Agreement" and "Exclusion of Liability" clauses in the
14 purchase agreement combine to preclude the Buyers from plausibly alleging that they were
15 justified in relying on Roseman's alleged extra-contractual representations and omissions. The
16 Delaware Chancery Court explained in *Arby Partners V, L.P. v. F & W Acquisition LLC* that
17 Delaware courts honor only those integration clauses between sophisticated parties that "contain
18 'language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has
19 contractually promised that it did not rely upon statements outside the contract's four corners in
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21 ¹⁴ See ECF No. 1 at ¶ 85 (the Buyers insist there is a live controversy because the JOLs have
22 demanded that the Buyers fulfill their obligation under the purchase agreement to issue and
deliver stock warrants to the JOLs).

23 ¹⁵ *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

¹⁶ *Id.* (quotation omitted).

1 deciding to sign the contract.”¹⁷ Here, the “Entire Agreement” clause states that, except as
2 stated in § 6.09, “this Agreement (including any schedules and exhibits hereto), constitutes the
3 entire agreement, and supersedes all other prior agreements, understandings, representations and
4 warranties, both written and oral, among the parties, with respect to the subject matter hereof,
5 including without limitation the Original Agreement and the Prior Agreement.”¹⁸ More to the
6 point, the “Exclusion of Liability” clause states that the Buyers

7 irrevocably agreed and acknowledged that . . . (b) they do not enter
8 into this Agreement on the basis of and do not rely, and has not
9 relied, upon any statement, representation or warranty . . . whether
10 oral or written . . . made or given by the Seller or the [JOLs] or by
 any of their employees, advisers or agents, or by any other person
 (whether a party to this Agreement or not) except those expressly
 set forth or referred to in this Agreement¹⁹

11 The Buyers argue that the purchase agreement nonetheless preserves fraud claims based
12 on extra-contractual representations because it sets forth an indemnification process²⁰ that is the
13 exclusive remedy for all claims “except in the event of fraud, willful misconduct, or intentional
14 or grossly negligent misrepresentation.”²¹ The Buyers theorize that, because fraud claims of all
15 stripes are excluded from the indemnification and exclusive-remedy clauses, they are also carved
16 out of the exclusion-of-liability and entire-agreement clauses.

17 After reviewing the relevant clauses, I conclude that the language is reasonably
18 susceptible to only one meaning: the one advanced by Roseman that the Buyers promised in
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20 ¹⁷ *Arby Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006)
21 (quoting *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004)).

22 ¹⁸ ECF No. 21-1 at 58, § 10.08.

23 ¹⁹ *Id.* at 59, § 10.15.

²⁰ *Id.* at 48–52, Art. VIII.

²¹ *Id.* at 52, § 8.03 (the “Exclusive Remedy” clause).

1 clear and unambiguous language that they were not relying on any promise or representation not
2 contained within the agreement. Thus, I grant Roseman’s dismissal motion on this ground.

3
4 **2. The fraud claim based on Roseman’s alleged intra-contractual statements survive dismissal.**

5 Roseman argues that the fraud claim based on his allegedly false intra-contractual
6 statements are barred under the purchase agreement’s “Survival” clause, which states that “[a]ll
7 representations and warranties contained in this Agreement shall survive the Closing for a period
8 of fifteen (15) months after the Closing; provided that the Fundamental Representations shall
9 survive in perpetuity and Section 4.12 shall survive until the expiration of the applicable
10 statute(s) of limitations.”²² The Buyers, Roseman contends, allege that he made three false
11 statements in the agreement: § 4.05 (accuracy of financial statements), § 4.06 (absence of certain
12 changes), and § 4.12 (taxes and tax returns).²³ The Buyers add one more in their response—
13 § 4.10 (all material contracts were in full force and effect).²⁴ Because they are not “Fundamental
14 Representations,”²⁵ Roseman argues that the fraud claim based on all but the statements
15 contained in § 4.12 is time barred.

16 The Buyers respond that, reading all the indemnification provisions in harmony,
17 including the survival clause, favors an interpretation that fraud claims, which are expressly
18 carved out of the indemnification process,²⁶ are subject to statutory, rather than contractual,
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20 ²² *Id.* at 48, § 8.01.

21 ²³ ECF No. 20 at 17–18.

22 ²⁴ *See* ECF No. 30 at 19.

23 ²⁵ ECF No. 21-1 at 11, Art. I, § 35 (defining “Fundamental Representations” as including those
24 representations of the Seller or Seller Management set forth in Sections 4.01, 4.02, 4.03, 4.04,
25 4.09(iii) and 4.12”).

26 ²⁶ *See id.* at 49, § 8.02(c); 52, § 8.03.

1 limitations periods. The Buyers also point out—in footnote—that they provided notice of their
2 claims within the Survival clause’s 15-month period.²⁷ I conclude after reviewing these clauses
3 that the language is susceptible to the meaning proffered by either party. Because ambiguities in
4 contract interpretation must be resolved in the Buyers’ favor at this dismissal stage of the
5 proceedings, I deny Roseman’s motion on this ground.

6 **C. The fraud claim against Roseman lacks the required particularity.**

7 Finally, Roseman argues that the Buyers’ fraud claim must be dismissed because it lacks
8 the particularity required by FRCP 9(b). “A motion to dismiss a complaint or claim ‘grounded in
9 fraud’ under Rule 9(b) for failure to plead with particularity is the functional equivalent of a
10 motion to dismiss under Rule 12(b)(6) for failure to state a claim.”²⁸ “Rule 9(b) demands that,
11 when averments of fraud are made, the circumstances constituting the alleged fraud be specific
12 enough to give defendants notice of the particular misconduct . . . so that they can defend against
13 the charge and not just deny that they have done anything wrong.”²⁹ “Averments of fraud must
14 be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged.”³⁰ The
15 plaintiff must set forth not only “the neutral facts necessary to identify the transaction” but also
16 “what is false or misleading about a statement, and why it is false.”³¹ “As with Rule 12(b)(6)
17 dismissals, dismissals for failure to comply with Rule 9(b) should ordinarily be without
18 prejudice.”³²

20 ²⁷ ECF No. 30 at 22, n.7.

21 ²⁸ *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003).

22 ²⁹ *Id.* at 1106 (quotation omitted).

23 ³⁰ *Id.* (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir. 1997)).

³¹ *Id.* (quoting *Decker v. GlenFed, Inc.*, 42 F.3d 1541, 1548 (9th Cir. 1994)).

³² *Id.* at 1108.

1 The fraud claim itself contains only a recitation of its elements and conclusions that those
2 elements have been met.³³ However, the Buyers allege earlier in their complaint the who, what,
3 where, and when of the relevant intra-contractual statements, and they conclude that those
4 representations were false, but the Buyers don't plead facts to plausibly show why they were
5 false.³⁴ They also conclude—but do not allege facts to plausibly show—that Roseman
6 intentionally hid and concealed from the Buyers facts material to his alleged intra-contractual
7 statements.³⁵ For these deficiencies, the Buyers' fraud claim against Roseman is not pled with
8 the required particularity. I therefore grant Roseman's dismissal motion on this ground.

9 The Buyers request leave to amend their complaint if it is deficient. I am not persuaded
10 that the Buyers cannot state a colorable claim for fraud against Roseman for his allegedly false
11 intra-contractual statements. Nor am I persuaded that the Buyers cannot plausibly state a
12 declaratory-relief claim against Roseman. I therefore dismiss the Buyers' claims against
13 Roseman without prejudice and with leave to amend all claims, except for their fraud claim that
14 is based on Roseman's allegedly false extra-contractual statements and omissions, which is
15 dismissed with prejudice and without leave to amend.

16 Conclusion

17 Accordingly, IT IS HEREBY ORDERED that Roseman's motion for reconsideration
18 [ECF No. 60] and Roseman's motion to dismiss [ECF No. 20] are GRANTED. The Buyers'
19 claims against Roseman are dismissed without prejudice and with leave to amend to cure the
20 deficiencies identified in this order, except for the Buyers' fraud claim based on Roseman's

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22 ³³ See ECF No. 1 at ¶¶ 69–81.


23 ³⁴ See *id.* at ¶¶ 29–35, 37–38.

³⁵ See *id.* at ¶ 44.

1 allegedly false extra-contractual statements and omissions, which is dismissed with prejudice.

2 The Buyers have until April 9, 2019, to file their amended complaint.

3 Dated: March 26, 2019

4 
U.S. District Judge Jennifer A. Dorsey